



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WELLS FARGO BANK, N.A., and
WELLS FARGO HOME MORTGAGE, INC.,
Plaintiffs,

v.

DEMETRIOS A. BOUTRIS, in his
official capacity as Commissioner
of the California Department of
Corporations,

Defendant.

CIV. NO. S-03-0157 GEB JFM

ORDER

On March 3, 2003, Plaintiffs filed an ex parte motion for a temporary restraining order ("TRO"), requesting some of the same relief Plaintiffs seek in their motion for a preliminary injunction, which is scheduled for hearing on March 10, 2003. Defendant filed an opposition on March 4, 2003, and Plaintiffs filed a reply on March 5, 2003.

The judge directed his staff to provide a copy of this Order to the parties and to the Office of the Comptroller of the Currency via facsimile transmission no later than 9:30 a.m. on March 6, 2003, so they could be apprized of its contents prior to official service. Nothing shall be faxed to the chambers' fax number absent the express advance approval of the judge.

1 Plaintiffs argue they were compelled to file this TRO "to
2 preserve the status quo and prevent significant harm while this court
3 considers and rules on Plaintiffs' pending Motion for Preliminary
4 Injunction. . . ." (Memo. in Support of Plfs.' Ex Parte Motion for
5 Temporary Restraining Order "Memo. in Supp." at 1.) Plaintiffs
6 assert:

7 The California Department of Corporations has
8 scheduled a March 11, 2003 hearing in an
9 administrative proceeding to revoke Plaintiff
10 Wells Fargo Home Mortgage, Inc.'s ("WFHMI's")
11 state-issued licenses to do business in California
12 and a pre-hearing conference in the license
13 revocation proceeding for 10 a.m. on March 10,
14 just one hour after this Court's hearing on
15 Plaintiffs' pending preliminary injunction motion
16 is set to commence. . . .

17 The Commissioner could seek to revoke WFHMI's
18 state licenses on March 13 or even sooner. As
19 explained below, revocation of WFHMI's state
20 licenses at this stage of the proceedings would
21 cause significant irreparable harm to WFHMI and
22 its customers, no matter how this Court ultimately
23 rules on the merits of the federal issues.

24 * * *

25 If the Commissioner proceeds with the license
26 revocation proceeding on March 11 and immediately
27 revokes WFHMI's state licenses, WFHMI will be
28 placed in an impossible position. It will be
forced to choose between (1) shutting down or
transferring its business operations in the State
of California until this Court has an opportunity
to rule on the federal issues, or (2) continuing
to do business in the State of California without
the state licenses at issue here and running the
risk that this Court will ultimately rule that
those licenses are required. No matter which
choice WFHMI makes, WFHMI, its customers, and the
California economy will suffer substantial
irreparable harm.

29 * * *

30 If WFHMI were to choose to continue business
31 operations without a license, it would face the
32 prospect of severe penalties for making and
servicing mortgages in California without a

license if this Court were ultimately to determine that these particular state licenses were necessary. Even if this Court were to rule in Plaintiffs' favor on the merits, revocation of WFHMI's state licenses prior to a ruling by this Court would cause anxiety among WFHMI's customers, employees, shareholders, investors, and ratings agencies.

(Id. at 1-3.)

Defendant rejoins "WFHMI holds itself out as a licensee of the state, yet refuses to comply with the laws by which all other licensees are compelled to abide." (Def.'s Memo. of P. & A.'s in Opp'n to Plfs.' Ex Parte Motion for Temporary Restraining Orders ("Opp'n" at 2.) Defendant suggests that even if WFHMI were granted federally-protected status, that would not preclude Defendant from revoking WFHMI's California licenses. Defendant states he began his examination of WFHMI "in April of 2002, before there was any claim of preemption That examination disclosed violations and a follow-up examination was conducted in April of 2002, covering the prior calendar year." (Opp'n at 5.)

To prevail on their TRO motion, Plaintiffs must demonstrate[] either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in [their] favor. Each of these two formulations requires an examination of both the potential merits of the asserted claims and the harm or hardships faced by the parties. . . . These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. These two alternatives represent extremes of a single continuum, rather than two separate tests. . . . Additionally, in cases

1 where the public interest is involved, the
2 district court must also examine whether the
public interest favors the plaintiff[s].

3 Sammartano v. First Jud. Dist. Court, in and for County of Carson
4 City, 303 F.3d 959, 965 (9th Cir. 2002) (internal citations and
5 quotation marks omitted); see also Ahmad v. Long Island Univ., 18 F.
6 Supp. 2d 245, 247 (E.D.N.Y. 1998) ("[T]he standards which govern
7 consideration of an application for a temporary restraining
8 order . . . are the same . . . as those which govern a preliminary
9 injunction.") (quoting Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO
10 v. New York Shipping Ass'n, Inc., 965 F.2d 1224, 1228 (2d Cir. 1992));
11 Hoffman v. Int'l Longshoremen's & Warehousemen's Union, Local No. 10,
12 492 F.2d 929, 933 (9th Cir. 1974) ("The court has jurisdiction to
13 grant injunctive relief or temporary restraining orders in order to
14 protect the public welfare or preserve the status quo pending a
15 hearing or to enforce its orders."). These are traditional equitable
16 factors "rooted deeply in . . . legal tradition, and stem from the
17 historical division of authority between courts of law and equity."
18 Miller for and on behalf of N.L.R.B. v. California Pacific Medical
19 Center, 991 F.2d 536, 540 (9th Cir. 1993). "[E]ach of these elements -
20 the probability of success on the merits, the balance of hardships and
21 the public interest - [is examined] in turn." Sammartano, 303 F.3d at
22 965.

23 A. Probability of Success on the Merits

24 Since Plaintiffs have not argued that WFHMI is in compliance
25 with California's licensing requirements, the essence of Plaintiffs'
26 position is that they should be allowed to remain out of compliance
27 with that law unless they receive an adverse judicial determination on
28

1 their claim that compliance is unnecessary because of pre-emptive
2 federal law. Plaintiffs advance the paradoxical position that
3 Defendant is precluded from revoking WFHMI's California licenses while
4 Plaintiffs' attempt to establish in this lawsuit that WFHMI does not
5 need those California licenses. Plaintiffs have not shown that
6 California's licensing revocation proceeding must be stayed while
7 Plaintiffs litigate their claims in federal court that WFHMI does not
8 have to possess California licenses to do the national banking
9 business it does in California. Therefore, Plaintiffs have not
10 demonstrated a probability of success on the merits of their claim.
11 that Defendant should be prevented from revoking WFHMI's California
12 licenses.

13
14 B. Irreparable Harm and the Balance of Hardships/Public
15 Interest

16 Plaintiffs' argument that WFHMI has shown that it will
17 suffer irreparable harm if a TRO is not granted is unpersuasive.
18 Plaintiffs state WFHMI will have two options if the TRO does not
19 issue, and that both would result in WFHMI suffering irreparable harm.
20 The first option - shutting down or transferring WFHMI's business
21 operations - reflects a predicament WFHMI created itself by its
22 apparent failure to comply with California's licensing requirements.
23 It would be ironic for an injunction to issue in such circumstances
24 since WFHMI could have avoided the harm it contends it will suffer had
25 it chosen to comply with the requirements of the California licenses
26 it possesses. This specter of harm has not been shown to be the type
27 of irreparable injury protectible in equity.

28 Plaintiffs' second option -- that even if WFHMI's California
licenses are revoked WFHMI might decide to continue doing business in

1 California without those licenses -- indicates that Plaintiffs' claim
2 that WFHMI would suffer irreparable harm without those licenses is
3 speculative since if Plaintiffs prevail on their claims in this suit,
4 they would prove that WFHMI does not need those licenses. WFHMI's
5 apparent actions of disregarding its licensing requirements under
6 California law, based on its position that those requirements are
7 inapplicable to a subsidiary of a national bank, is the source of the
8 purported irreparable harm it fears it could suffer. This has not
9 been shown to be the type of irreparable harm protectible in equity.

10 Accordingly, Plaintiffs have not demonstrated that they
11 would experience irreparable harm if the TRO is denied, and assuming
12 *arguendo* that the threatened harm asserted is cognizable in equity,
13 Plaintiffs have not shown that harm is much more serious than the
14 hardship Defendant has shown California would endure if the TRO were
15 granted. Defendant's showing embraces the California public interest
16 of enforcing California's licensing requirements on entities issued
17 such licenses.

18 CONCLUSION

19 For the stated reasons, the probability of success on the
20 merits, the balance of the hardships, and California's public interest
21 do not favor granting Plaintiffs a TRO. Therefore, the motion for a
22 TRO is denied.

23
24 IT IS SO ORDERED.

25 DATED: March 6, 2003

26
27
28 
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE